

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

AA. Davis
77-1171

To be argued by
RONALD L. GARNETT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1171

UNITED STATES OF AMERICA,

Appellee,

—v.—

CODELL GRIFFIN and WILLIE J. GRIFFIN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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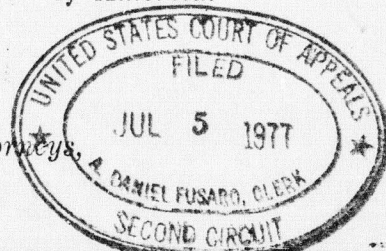


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**United States Court of Appeals
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Docket No. 77-1171

UNITED STATES OF AMERICA,

Appellee,

—v.—

CODELL GRIFFIN and WILLIE J. GRIFFIN,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Codell Griffin and Willie J. Griffin appeal from judgments of conviction entered on March 9, 1977, in the United States District Court for the Southern District of New York, after a four week trial before the Honorable Whitman Knapp, United States District Judge, and a jury.

Indictment S76 Cr. 938, filed on October 26, 1976, charged the two appellants and seven other defendants in thirteen counts with various violations of the federal narcotics laws.* Count One charged Codell Griffin, a/k/a

* Indictment S76 Cr. 938 superseded Indictment 76 Cr. 938, filed October 5, 1976, and essentially added the true names of some of the defendants and a forfeiture clause in Count Two as to Codell Griffin.

"Cody;" Willie J. Griffin, a k/a "Bill;" John Doe, a/k/a "Leroy Sullivan;" Jerome Hatton, a/k/a "Jew;" Kenneth Ivery, a/k/a "Kenny;" Thomas Boykin, Jr., a/k/a "Morris;" Robert Charles Burnside, a/k/a "Rico;" John D. Bryant, a/k/a "Gypsy;" and Donna Forte with a conspiracy to violate the federal narcotics laws from September 1, 1971, to October 26, 1973, the date of the filing of the indictment, in violation of Title 21, United States Code, Sections 846, 812, 841(a)(1) and 841(b)(1)(A). Count Two charged Codell Griffin with a continuing criminal enterprise in violation of Title 21, United States Code, Section 848. Counts Three through Five charged Codell Griffin with possessing with intent to distribute approximately one-half kilogram of heroin on three separate occasions in April, May, and June, 1974. Count Six charged Codell Griffin with distributing approximately two hundred quarter-spoons of heroin in April, 1975. Count Seven charged Donna Forte with distributing approximately fifty quarter-spoons of heroin in September, 1975. Count Eight charged Codell Griffin with distributing approximately one-eighth kilogram of heroin on or about December 16, 1975. Count Nine charged Codell Griffin, Willie J. Griffin and John Doe, a/k/a "Leroy Sullivan," with distributing approximately one hundred quarter-spoons of heroin on or about February 13, 1976. Count Ten charged Codell Griffin and Jerome Hatton with distributing approximately one hundred quarter-spoons of heroin on or about June 28, 1976. Count Eleven charged Codell Griffin and Thomas Boykin, Jr. with distributing approximately twenty-nine quarter-spoons of heroin on or about June 29, 1976. Count Twelve charged Codell Griffin and Kenneth Ivery with distributing approximately forty quarter-spoons of heroin on or about July 14, 1976. Count Thirteen charged Kenneth Ivery with distributing approximately seventy-nine quarter-spoons of heroin on or about July 14, 1976.

Trial commenced as to six defendants with jury selection on January 4, 1977.* On January 26, 1977, after two days of deliberations, the jury returned a verdict finding Codell Griffin guilty on Counts One, Nine, Eleven, and Twelve; Willie J. Griffin guilty on Counts One and Nine; Kenneth Ivery guilty on Counts Twelve and Thirteen. The jury found Boykin, Burnside and Forte not guilty on all counts in which they were named. The jury was also unable to agree upon a verdict as to Codell Griffin on Count Two and Kenneth Ivery on Count One; mistrials were declared on those charges.

On March 9, 1977, Judge Knapp imposed the following sentences:

<i>Defendant</i>	<i>Count</i>	<i>Special Parole</i>	
		<i>Imprisonment</i>	<i>Term</i>
Codell Griffin	1, 9, 11, 12	15 years on each count concurrently	5 years
Willie J. Griffin	1, 9	7½ years on each count concurrently	3 years
Kenneth Ivery	12, 13	Youth Corrections Act, 18 U.S.C. § 5010 (b), concurrently	_____

All three defendants were remanded and are presently serving their sentences.**

* On motion of the Government with the consent of their counsel, Jerome Hatton and John D. Bryant were severed from the trial. John Doe, a/k/a "Leroy Sullivan," was a fugitive at the time of trial and remains at large.

** On April 6, 1977, and with the consent of the Government, a stipulation was filed by Kenneth Ivery, and signed by the Hon. Morris E. Lasker, United States District Judge, withdrawing Ivery's appeal.

Statement of Facts

The Government's Case

A. Introduction: Nature of the Conspiracy

The investigation and prosecution of this case brought to trial one of the largest distributors of narcotic drugs in the central Harlem area of New York City, and exposed a major street-level narcotics organization whose operations were centered principally in a one block area on 116th Street between Lenox and Seventh Avenues.

The proof at trial overwhelmingly established that Codell Griffin [hereinafter "Codell"], assisted substantially by his brother, Willie J. Griffin [hereinafter "Willie"], was the head of an enormous, illicit enterprise responsible for the distribution of multi-quantity "quarter-spoon" (tablespoon) amounts of heroin at the street level between 1967 and 1976 in Harlem. Codell and Willie, as large wholesalers, negotiated the sale of substantial quantities of heroin to and collected proceeds from other smaller street-level distributors who in turn sold the heroin to street addicts and users. Co-defendants and co-conspirators, such as Jerome Halton, Leroy Sullivan, Kenneth Ivery, and Thomas Boykin, acted as employees of Codell and negotiated the sale of and delivered heroin to and collected money from the smaller street-level distributors for him. Robert Burnside and John Bryant functioned at various times as employees of Codell, and as smaller street-level distributors of heroin to addicts and users. Donna Forte was an independent street-level distributor who was supplied with heroin by Codell Griffin.

As the heroin was being distributed down from Codell to addicts and users in the street, money traveled up to him. The Government's proof showed Codell to have

been in possession, either actually or constructively, of approximately \$387,000 in the period from 1972 to 1976. His profit from this venture no doubt exceeded that figure many times over.

B. Codell Griffin agrees to use William Clark as a worker

In the summer of 1967, Red Turner and one "Jimmy", street workers for Codell Griffin, were selling heroin in \$2.00 bags. William Clark, also known as "Country", asked Turner to ask Codell if Country could work for Griffin selling heroin. Thereafter, about one week later, Turner introduced Codell to Clark at the Blue Cup Bar in Harlem. Griffin asked Clark how much heroin he could sell daily, to which Clark responded that he could sell ten bundles, each containing fifteen \$2.00 bags of heroin. Later that same night Jimmy told Clark he would bring Clark the heroin at 10:00 p.m. in the bar. They met in the bar and Jimmy gave Clark ten bundles. Clark then sold the heroin and returned to the bar where he gave Jimmy \$200.00. Clark saw Jimmy give the money to Turner, telling Turner that Clark was ready for the next delivery. (Tr. 700-07).*

Clark continued to sell ten bundles of heroin on a daily basis for Codell for approximately two weeks, when he increased his amounts of heroin sales to twenty bundles a day. During the next year Turner accompanied Clark every morning to Codell Griffin's house on 129th Street between Lenox and Fifth Avenues. Clark remained in the kitchen and observed Turner and Griffin

* "Tr." refers to the trial transcript; "GX" to Government Exhibits in evidence; "Br." to the brief on appeal of the specified defendant; "App." to the appendix of the specified defendant.

proceed to another room in the house. Later, Turner returned to Clark and gave him the heroin in the presence of Griffin. On other occasions Turner would give Clark the heroin in the Bar. During this period Codell Griffin also supplied others with heroin. (Tr. 708-11).

In 1968, Clark decided to buy heroin in bulk and dilute, package, and sell it on his own independently of Codell Griffin. Codell suggested that if Clark wanted to go on his own, Clark should buy the bulk heroin from him, and Clark agreed. (716-17). He purchased one ounce of pure heroin for \$500 on three occasions from Codell Griffin in Griffin's house, and later cut and sold it on the street. (Tr. 718-27). Clark was later arrested for a robbery and was jailed for approximately one year. (Tr. 728).

C. Leander Clarke commences supplying heroin to and later purchases heroin from Codell Griffin

In the summer of 1973, Leander Clarke began selling heroin on the street with Donna Forte, his girlfriend at the time. (Tr. 420-22). He discontinued selling heroin in March 1974, following an arrest.

While on 116th Street between Lenox and Seventh Avenues (Tr. 425), in April 1974, Codell Griffin asked Clarke if Clarke could supply Griffin with heroin. Clarke said he would check and return later. Clarke contacted his source, Patricia Doll, who told him that it would take a few days. The next day Clarke again spoke with Doll who told him she had the heroin for sale. Clarke met Codell Griffin in Jimmy Daniels' Bar on 116th Street and received \$16,500 in a paper bag for one-half kilogram of heroin. Clarke put the money in his car. (Tr. 430-

35). Clarke and Griffin then entered the Tiger Lounge. Patricia Doll joined them and told Clarke she had also placed the heroin in Clarke's car. Clarke left Griffin and Doll in the Tiger Lounge and returned with the package of heroin, which he then gave to Griffin. Clarke later that night gave Doll the \$16,500 he had received from Griffin and received \$500 from her for his role in the sale. (Tr. 437-38).

Clarke acted as the middle man on two later sales of one-half kilogram of heroin to Griffin in May and June 1974. Griffin saw Clarke again in the Tiger Lounge in Harlem in May, 1974, and asked Clarke if he could get more heroin. They later went to the Bronx where Griffin went into an apartment building and returned with a brown paper bag with \$16,500 in cash. They then went to a McDonald's restaurant in the Bronx, where Doll joined them and gave the heroin to Clarke, who then gave it to Griffin. Clarke later gave the \$16,500 to Doll who gave him another \$500. (Tr. 439-44). In June 1974, Codell Griffin again saw Clarke on 116th Street and asked him if he could get any more heroin. Clarke called Doll, who told Clarke to meet her with Griffin at a location off Eleventh Avenue in Manhattan. Clarke and Griffin then met Doll and a woman named "Cookie" who was holding the heroin. Clarke took the heroin from Cookie and gave it to Griffin. Clarke and Griffin then left that area and returned to central Harlem. (Tr. 44-48).

Clarke was jailed on another unrelated state narcotics charge, but while released on bail in April 1975 he resumed his relationship with Codell Griffin. They met on 116th Street where Clarke told Griffin he needed money and wanted to sell heroin. Griffin gave Clarke 200 "quarters" of heroin, which Clarke stored at Donna Forte's house. This heroin was sold on the street and

Forte later made partial payment to Griffin for it. In May 1975, Clarke again saw Griffin on 116th Street. They discussed Clarke's part payment for the 200 quarters of heroin, and Griffin told Clarke "not to worry" about it. Clarke later that day sent Forte to pick up an additional 100 quarters of heroin from Griffin. It too was sold and money was paid to Griffin again by Forte. (Tr. 452-63).

Clarke finally jumped bail in connection with his pending state case and, with Donna Forte, he fled to Greenville, South Carolina. (Tr. 463-64). While there, he saw Codell Griffin and again apologized for his failure to pay in full for the heroin he had previously received. Forte subsequently returned to New York alone. Clarke called her and instructed her to go to Codell Griffin to get some heroin to sell in order to get money. Forte received 50 quarters of heroin from Griffin. She sold it and sent the money by Western Union to Clarke in South Carolina. (GX. 5; Tr. 468-72). Clarke was subsequently apprehended as a fugitive from New York in South Carolina. (Tr. 479).

D. James Bryant joins the Codell Griffin operation

James "Kid" Bryant, the brother of co-defendant John D. Bryant, a/k/a "Gypsy," was released from imprisonment on a narcotics charge in Virginia in March, 1975. He resumed selling narcotics in Richmond, but in June 1975, came to New York. (Tr. 65). He contacted his brother and began selling narcotics for him on a daily basis out of a store at 117 West 116th Street in Harlem. Another person selling heroin there was co-defendant Robert Charles Burnside, a/k/a "Rico." James Bryant testified that from June until September 1975, the operation from the store was as follows: John Bryant would

place his orders for a certain quantity of heroin quarters with Willie J. Griffin, a/k/a "Bill." Thereafter, Leroy Sullivan would deliver the heroin to John Bryant at the store. The heroin was stored in an apartment across the street from the store until needed for sale. Once the heroin quarters were sold from the store, at \$50 each (Tr. 89), Codell Griffin or his brother Willie Griffin would return to the store and pick up as much as \$35 per quarter as their part of the proceeds, two or three times a day. For his participation in this operation, James Bryant received approximately \$2,000 weekly. (Tr. 67-88, 109).

In September, James Bryant began selling heroin independently of his brother. He told Willie Griffin he needed to make money for himself and wanted to sell heroin quarters on his own and Willie told Sullivan to give James Bryant 50 quarters. James Bryant sold heroin received in this manner from September until December 1975. He paid Willie, and on one occasion Codell, as much as \$1,700 for each order of heroin. (Tr. 93-8, 110-12). During November or December, 1975, 200 quarters of heroin were inadvertently lost by Willie Griffin. Codell Griffin discussed this with John Bryant and, clearly establishing his authority as the head of his empire of distribution, said that "it wasn't Bill's (Willie Griffin) job to handle the quarters, it was Roy's job to handle the quarters." (Tr. 116-19).

In December James Bryant received from Sullivan 100 "quarters" of heroin, which were of poor quality. Bryant told Codell Griffin "that the product wasn't any good." Bryant sold the heroin but failed to pay Griffin fully, owing him a balance of \$3,500. As a result of this, Bryant ceased selling heroin received from the Griffin brothers. (Tr. 113-16).

E. Drug Enforcement Administration (DEA) operations

Subsequent to his release from prison in 1969, William Clark became an informant for the DEA and participated in several cases, including the Codell Griffin case beginning in September 1975. (Tr. 695-96, 729). On February 12, 1976, James Bryant voluntarily entered the DEA offices and offered his services to the DEA as an informant. Both Bryant and Clark were supervised during the course of the Codell Griffin investigation by Agent Samuel Blackburn. (Tr. 940-41, 957-58). In addition, Agent Blackburn acted alone and negotiated with Codell Griffin on several occasions. (Tr. 1011). During most negotiations and purchases of heroin, investigation techniques including consensual recordings, photographs and movie film were employed.

On September 12, 1975, Clark and Agent Blackburn attempted to purchase two ounces of pure heroin from Codell Griffin on 116th Street in Harlem. Griffin told them he did not have any heroin then, but that they should return the next day. (Tr. 943).

On December 30, 1975, Clark and Blackburn went again to 116th Street to purchase heroin from Codell Griffin. They entered the store at 117 W. 116th Street where two other co-conspirators, "Gator" and "Real Thing," attempted to sell them quarters of heroin; however, Blackburn declined. (Tr. 945-46). Again, on January 8, 1976, Blackburn, Clark and another agent went into the 117 W. 116th Street store to meet Codell Griffin. (GX 6, 6a-6c). While there Gator (GX 5) delivered a stack of quarters of heroin which was stored in a billiard table. Upon being told that Blackburn was waiting for Codell Griffin, Gator told Blackburn that "Cody's other man, Rico" (Burnside) was nearby. He left the store

and returned a short time later. He told Blackburn to come with him. Blackburn and the others left and went to Burnside's store a few doors away. Burnside, upon seeing them, denied knowing who they were. Blackburn then left the store and subsequently left the area. (Tr. 947-50; GX 5A, 5C). Again on February 4, 1976, Blackburn and Clark went to 116th Street to meet Codell Griffin. While there they asked Gator where Griffin was. Gator replied "who, the General?" and responded that Codell was out of town. (Tr. 957).

On February 12, 1976, Bryant, now acting as an informant, met Codell Griffin and asked if Griffin could sell him 100 quarters. Griffin told him he would sell them to him for \$4,500. (Tr. 120-22). The next day, February 13, 1976, Blackburn and Bryant, went to 116th Street between Lenox and Seventh Avenues. Codell Griffin arrived thereafter by car. Bryant walked over to Griffin and told him he and his partner (Blackburn) were ready to complete the sale. While waiting for the heroin to be delivered, Griffin told Bryant to get the money from Blackburn. When Bryant returned with only \$1,000, Griffin refused part payment and said he would wait for the heroin to arrive to receive full payment. (Tr. 123-24). Willie Griffin and Leroy Sullivan then arrived by car and stopped in front of an apartment building on 116th Street. Sullivan got out of the car carrying a yellow bag and entered the building. Willie drove on and stopped near Codell, where he left the car and conversed with his brother. The two then walked back toward the building, passing Blackburn and Bryant. Bryant followed Codell and Willie Griffin into the building, where Codell asked Bryant for the money. Bryant left the building and rejoined Blackburn, who gave him \$4,500. Bryant returned to the building. Blackburn walked past the doorway following Bryant and saw Codell and Willie Griffin standing in the hallway. Upon

giving Codell Griffin the money, Codell Griffin called Sullivan and told him to give Bryant the heroin. After the transfer, the four men all left the building one by one. Bryant, leaving last, met Blackburn and gave the bag of heroin to him. (Tr. 123-26, 957-64; GX 19).

On March 4, 1976, a consensual telephone recording was made from the DEA office in which Bryant called to a store on 116th Street. Upon speaking to Willie Griffin, Bryant told him he was ready to buy heroin. Willie told Bryant that Codell would arrive shortly. (Tr. 127; GX 1, 1A). The next day, March 5, 1976, Blackburn and Bryant went again to 116th Street, where Codell joined them shortly thereafter. Bryant left the government car, went over to Codell, and told him that Blackburn was ready to purchase 1/8 kilogram of heroin for \$5,500. Griffin later told Bryant that he would give Blackburn four ounces of weighed heroin which could be cut or diluted seven or eight times (GX 2, 2A, 7, 7a-7d). After further discussion, Bryant and Blackburn walked over to Griffin and attempted to talk with him. Griffin told Blackburn that Bryant was talking as Griffin's representative and that he (Griffin) had too much to lose by talking to a stranger. Blackburn returned to the car and waited for the heroin. Griffin then told Bryant to get the money and hold it. He also said that "Tim" would come and give him the heroin and that he should give Tim the money. Finally a man named "Dicky Diamond" walked over to the car and told Blackburn and Bryant that the heroin was in the alley. Blackburn told Diamond he refused to go into an alley. Diamond, immediately thereafter, returned directly to Griffin. Bryant then left the car and met Griffin who told him the deal was off. (GX 8, 8a-8d). Prior to leaving the area, Blackburn spoke to Willie Griffin and complained about completing a transaction with such a large amount of money in an alley. (GX 3a-3f; Tr. 127-41, 976-84, 1003-05).

Acting alone, Agent Blackburn again met Willie Griffin on March 17, 1976, on 116th Street and asked him if any heroin was available. Willie told Blackburn that a shipment of pure heroin was due the following week. (Tr. 1009-110). One week later, on March 24, 1976, Blackburn met Codell Griffin on 116th Street and discussed heroin. Codell told Blackburn that it was dangerous to talk to strangers about heroin, and that Blackburn should have completed the earlier sale on March 5, 1976, because the heroin Tim had in the alley was his own heroin. He also said he expected a shipment of heroin the following week. In response to Blackburn's request that Griffin provide him with a contact, Griffin told Blackburn that his brother Willie could be contacted. (Tr. 1011-116; GX 11A). Agent Blackburn met Codell again on March 27, March 30, and April 9, 1976, and engaged in similar negotiations for 1/8 kilogram of heroin. (Tr. 1021-27; GX 12A; Tr. 1027-29; GX 13A; Tr. 1030-33; GX 14A).

In late April, 1976, James Bryant had a conversation with Codell Griffin. Griffin told Bryant that he believed Blackburn was an undercover agent and that neither he nor Bryant should sell any narcotics to him. When Bryant told Blackburn this, Blackburn terminated further undercover negotiations with the Griffin organization. (Tr. 141-44, 1033-34). However, on May 14, 1976, Bryant, equipped with a recording device, returned to 116th Street where he met with Willie Griffin and discussed his desire to purchase 75 or 80 quarters of heroin from him. When Willie told him the cost would be \$35, Bryant refused saying he believed he could get a smaller price from Codell. (Tr. 144-46; GX 4A).

On June 29, 1976, William Clark, Blackburn, and other agents returned to the 116th Street area, where Clark, wearing a body recorder, met alone with Codell

Griffin and told him he wanted to purchase heroin. Griffin called co-defendant Thomas Boykin and told Boykin that he had no heroin but that Clark was to be trusted and that Boykin should sell the heroin quarters to Clark. Boykin and Clark then began to leave, but Boykin began speaking to another person. Clark complained to Griffin who then reprimanded Boykin. Boykin left the area by taxi and returned shortly thereafter. Boykin signaled Clark and the two entered a hallway. Boykin apologized for taking so long to return and for only having 29 quarters of heroin, explaining that the heroin was the being cut at the cutting mill. Clark gave Boykin \$1,200 and Boykin handed him the 29 quarters of heroin. Clark left the hallway and joined the agents where the heroin and remaining money was given to Blackburn. (Tr. 733-42, 1034-45; GX 21, 26).

Two weeks later, on July 14, 1976, in the afternoon, Clark was again instructed to return to the 116th Street area, under agent surveillance and supervision, to purchase heroin from Codell Griffin. Clark met Codell and asked him if he had any quarters of heroin to sell. Griffin called Kenneth Ivery to join them and told Ivery that Clark was to be trusted. Ivery and Clark walked away and discussed the heroin and its price. Ivery then immediately returned alone to speak with Codell Griffin. Ivery rejoined Clark and they walked over to another man named "Gil". After further discussion about the heroin, Ivery told Clark that he only had 40 quarters of heroin available at that time. Clark said he would have to talk to his partner about accepting only that amount. He then left to rejoin the agents to seek authorization to buy the heroin. He returned to Ivery and Gil a short time later and told them he would buy the 40 quarters. They all entered a hallway, where Gil went upstairs to get the heroin, returned, and placed the package of heroin on the hallway steps. Clark gave Ivery \$1,600, in exchange for

the heroin and told Ivery that he would return later that night for the balance of the heroin he wished to buy. After leaving the building he had a short conversation with Codell about the heroin and then he joined the agents, to whom he turned over the heroin and the body recorder. (Tr. 742-56; GX 10, 10a-10d, 22). Later that evening, Clark returned to 116th Street, under agent surveillance, where he met Ivery and Gil. They had further discussion concerning the heroin, and the three men then returned to the same hallway as earlier. Gil left the building and returned with some candles. He then went upstairs and returned with the heroin which he again placed on the hallway stairs. Clark gave Ivery \$3,100, took the heroin and left the building to rejoin the agents. (Tr. 757-63, 1075-79; GX 23, 24, 24a).

The Defense Case

Neither appellant offered any evidence.

ARGUMENT

POINT I

Due Process Was Not Denied Codell Griffin By The Use Of Paid Informants.

Codell Griffin argues here, for the first time, that his right to due process was violated by the Government's use of paid informants during the course of the investigation into his criminal narcotics activity. At no time did counsel (who represented Griffin at trial) (1) allude to any such defense during trial, (2) make any motions for dismissal or judgment of acquittal before, during, or after the trial, or (3) request any jury instructions of the Court with respect to that defense. For these rea-

sons alone, the claim is utterly without merit. See *United States v. Neal*, 536 F.2d 533, 534 (2d Cir. 1976). See generally, *United States v. Wright*, 466 F.2d 1256, 1259 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *United States v. Projansky*, 465 F.2d 123, 140 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States v. Bishop*, 367 F.2d 806, 809 (2d Cir. 1966); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

Even if properly raised at this juncture, the argument that Griffin's due process rights were violated is frivolous. Griffin claims his rights were violated as a matter of law because the Government utilized paid informants, a claim which clearly disregards the applicable authority. In this Circuit, use of paid informant does not, of itself, violate the due process rights of a defendant and render a conviction offensive. *United States v. Neal*, *supra*; *United States v. Cuomo*, 479 F.2d 688, 691-92 (2d Cir. 1973), *cert. denied*, 414 U.S. 1002 (1973); *United States v. Jacobs*, 431 F.2d 754, 762 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971); *United States v. Smalls*, 363 F.2d 417, 420 (2d Cir. 1966), *cert. denied*, 385 U.S. 1027 (1967).

Griffin urges this Court to adopt the holding of *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962), where, under the facts of that case, the Fifth Circuit disapproved of a contingent fee arrangement to produce evidence against particular named defendants as to crimes not committed. However, here, as in *United States v. Neal*, *supra*, and *United States v. Smalls*, *supra*, there is no evidence of any arrangement that approaches the facts in *Williamson*.

The informant William Clark testified that he became an informant for the DEA in 1969 after his release from prison. He further testified that he had participated in eight other cases prior to the Codell Griffin

case and had received monies from the DEA since 1969. (Tr. 696-98). Although Clark began working on the Codell Griffin case in September 1975 (Tr. 729), it was not until June, 1976, that he received any monies on that case. (Tr. 833, 1375). The informant James Bryant testified that he had had no agreement with the Government concerning the monies that subsequently had been paid to him during the Griffin investigation, but that he had been paid approximately \$3,000 periodically by agent Blackburn and other agents until he was jailed on a state charge on September 18, 1976. He testified he received an additional \$3,000 from Blackburn after September 1976, which was used to post bail on his pending state charge. (Tr. 371-79).

Thus, the record is barren of any evidence, and Griffin cites none, which suggests that Clark or Bryant were paid contingent fees to specifically incriminate Codell Griffin. This case thus differs substantially from *Williamson*, where it was clear the Government agents had paid a "specific sum of money to convict a specified suspect." *United States v. Smalls, supra*, 363 F.2d at 420, quoting *United States v. Williamson, supra*, 331 F.2d at 445. Absent any specific showing of unconscionable conduct on the part of the Government in paying the informants in this area of law enforcement, *Cf. Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932); *Hampton v. United States*, 425 U.S. 484, 488-89 (1976); this court should not, as a matter of law, hold that permissible limits have been exceeded.

POINT II

The Evidence Against Appellants Was Sufficient To Establish Their Guilt.

Willie Griffin argues that there was insufficient evidence to support his conviction on the conspiracy and substantive counts. Codell Griffin contends that the evidence linking him to the distributions charged in Counts Eleven and Twelve is similarly insufficient. These arguments are without merit.

The evidence showed that Codell Griffin was at the apex of a system of heroin distribution in which he was aided substantially by his brother, Willie J. Griffin. In 1967 Codell Griffin was intricately involved in the distribution of heroin to the ultimate street sellers of his heroin, such as William Clark and Red Turner. Later, in 1974 and early 1975 he received heroin from and made deliveries of heroin to Leander Clarke. However, in 1975, showing sophistication with much gained experience, Codell Griffin used third parties, such as Leroy Sullivan, to make the actual deliveries to street sellers, but only after he made direct negotiations. Finally, in 1976 Codell Griffin disavowed direct contact with any persons other than his most trusted confident, his brother Willie Griffin.

The evidence of this interrelationship, when combined with the other evidence at trial gives rise to a number of inferences which the jury was warranted in finding. On appeal, the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. This includes circumstantial evidence and inferences drawn therefrom. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

The test for sufficiency of the evidence is whether a reasonable person could conclude, upon the evidence, that a defendant was guilty beyond a reasonable doubt.

United States v. Wiley, 519 F.2d 1348, 1349 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). Here, the evidence was more than sufficient to sustain these verdicts.

A. Willie J. Griffin

Willie Griffin was convicted of the Conspiracy Count (Count One) and one distribution Count (Count Nine).

1. Conspiracy Count

The evidence established beyond any shadow of a doubt that Willie Griffin was a knowing member of a conspiracy whose object was to distribute massive amounts of heroin to the drug population in central Harlem.*

James Bryant's testimony concerning the many sales which occurred in the store at 117 W. 116th Street, the many payments made to Codell and Willie Griffin from June to December, 1975, before the sale which occurred on February 13, 1976, clearly established Willie Griffin's knowledge and participation in the conspiracy. Orders for narcotics were placed with Willie Griffin. Subsequent to these orders, heroin was delivered by Leroy Sullivan. Finally, Willie, and at various times Codell, would return to the store to receive the proceeds, two or three times daily. (Tr. 67-89).

When Bryant began selling heroin for his own benefit, he negotiated directly with Willie and, in his absence, with Codell. On no occasion were proceeds paid to any-

* Willie Griffin, for the most part, attacks his conviction on the conspiracy charge only on the basis of the single sale of heroin which took place on February 13, 1976, while ignoring the testimony of James Bryant concerning many sales prior to that date. Statement of Facts, *supra*, at 9.

one other than the Griffin brothers. Further, on March 17, 1976, Agent Blackburn discussed the availability of heroin with Willie Griffin and was told to return the following week (Tr. 1009-1010). This independent, non-hearsay evidence adduced against Willie Griffin easily reached the threshold required by *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970), that the association of a defendant to a conspiracy must be shown "by a fair preponderance of the evidence independent of the hearsay utterances." See also *United States v. Stanchich*, 550 F.2d 1294, 1298 (2d Cir. 1977); *United States v. Glazer*, 532 F.2d 224, 228-29 (2d Cir. 1976), *cert. denied*, — U.S. — (1977).*

There was other non-hearsay and hearsay evidence of Willie Griffin's participation in the conspiracy. He negotiated with Bryant for heroin on May 14, 1976, which conversation was recorded. (GX 4A). Earlier, on March 24, 1976, when agent Blackburn asked Codell Griffin for a representative with whom he could negotiate, he was told he could speak with Willie Griffin. (Tr. 1016).

On the basis of these facts, ignored in Willie Griffin's brief, as well as other circumstantially strong inferences, there can be no doubt that Willie Griffin knew what the objective of the conspiracy was and helped to bring it about.** *United States v. Projansky*, *supra*, 465 F.2d at 135. It is thus apparent that Willie Griffin is not "entitled to the benefit of the single act line of cases" upon which he relies. See *United States v. Tramunti*, 513 F.2d 1087, 1112 (2d Cir.), *cert. denied*, 423 U.S. 832

* This Court has recently reiterated that only a "likelihood of illicit association" is necessary to meet this test. *United States v. Mejias*, 552 F.2d 435, 445 (2d Cir. 1977).

** As this Court has noted, once a conspiracy has been demonstrated, only "slight" evidence of the defendant's participation is necessary to support his conviction. *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974).

(1975); *United States v. Torres*, 503 F.2d 1120, 1123 (2d Cir. 1974).

2. Substantive Count

It is well-established law that aiding and abetting is a crime separate and distinct from conspiracy. *Nye & Nessen v. United States*, 336 U.S. 613 (1949); *United States v. Tropiano*, 418 F.2d 1069, 1083 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). In order to be convicted of aiding and abetting a "defendant must be shown to have knowingly associated with and participated in the criminal venture in a manner designed to accomplish its goal." *United States v. Mariani*, 539 F.2d 915, 919 (2d Cir. 1976). It is also clear that willful participation in a criminal venture may be established by evidence which is completely circumstantial, *United States v. Di-Stefano*, Dkt. No. 76-1581, slip. op. 3539, 3554 (2d Cir., May 16, 1977); *United States v. Wiley*, *supra*, 519 F.2d at 1350-51; *United States v. Manfredi*, 488 F.2d 538 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), and in cases of circumstantial evidence the whole is generally greater than the sum of its parts. See *United States v. Bottone*, 365 F.2d 389, 392-93 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *United States v. Geaney*, *supra*, 417 F.2d at 1132. Thus, Willie Griffin's actions on February 13, 1976, must be viewed in the total context of the evidence against him at trial.

On numerous occasions from September to December, 1975, he had negotiated for the sale of heroin with James Bryant, arranged for the delivery of the heroin to Bryant by Leroy Sullivan, and received payment from Bryant.

(Tr. 93-98, 110-12). On February 13, 1976, Willie Griffin drove the car to the apartment building where the exchange took place and left Sullivan. He then continued to meet Codell Griffin (who at that time was waiting for its arrival (Tr. 123-24)) to advise him that the heroin had arrived. He then accompanied Codell Griffin into the hallway and remained there until the exchange of the heroin for money was completed. Finally, he surreptitiously left the building with Codell Griffin, Sullivan and Bryant. (Tr. 963).

Viewed in this context, Willie Griffin's presence before, during and after the sale, justified an inference by the jury that he was no innocent bystander.* Cf. *United States v. Manfredi*, *supra*, 488 F.2d at 596; *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

B. Codell Griffin

Codell Griffin's conviction on the substantive Counts Eleven and Twelve was based upon his introduction of the informant William Clark to Thomas Boykin (Count Eleven) and Kenneth Ivery (Count Twelve). He now contends that the evidence was insufficient to sustain the jury's verdict.

Codell's contention, as with the claim of Willie Griffin with respect to his substantive count conviction, ignores the material inferences that flow from the totality of the evidence as to Count Eleven: Griffin had previously expressed his concern for dealing in heroin directly with

* This Court said in *United States v. Jones*, 308 F.2d 26, 30 (2d Cir. 1962) (en banc), that "one having a working relationship or a sufficient association with those having physical custody of the drugs so as to enable him to assume their production, without difficulty, to a customer as a matter of course may be held to have constructive possession."

anyone other than his brother Willie Griffin and, in fact, had steered Agent Blackburn to his brother (Tr. 1016); evidence concerning other sales, including the actual sale of February 13, 1976, and the attempted sale to Blackburn and James Bryant of March 5, 1976, showed that Codell Griffin used previously unknown, third-parties ("Tim" and "Dicky Diamond") to make deliveries (Tr. 1013); Griffin later expressed his concern about dealing with undercover agents (Tr. 141-44); on June 29, 1976, Griffin then introduced Clark to Boykin stating that he knew Boykin had heroin and that Clark could be trusted (Tr. 736); and, when Boykin conversed with another person in the middle of the deal, Clark complained to Griffin who then reprimanded Boykin (Tr. 73839). These facts, in context, support the circumstantial inference that Griffin was the man behind the sale who exercised his control over his employee, Boykin.

With regard to Count Twelve the evidence was equally persuasive: When Clark returned on June 14, 1976, to purchase more heroin and asked Griffin where Boykin was, Griffin said he was not around; when Clark asked Griffin if he knew anyone who had quarters of heroin for sale, Griffin told another person to find Kenneth Ivery; when Ivery arrived in the area, Griffin called him over to join them; Griffin told Ivery that Clark could be trusted; Ivery and Clark then discussed prices; Ivery walked directly back to Codell Griffin and had a conversation with him and then returned to Clark; subsequent to this, the sale occurred (Tr. 744-46, 753-55). Compare *United States v. Lubrano*, 529 F.2d 633, 636 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States v. Grant*, 545 F.2d 1309, 1313 (2d Cir. 1976).

Griffin argues that there is no proof of a heroin relationship with Boykin and Ivery. Clearly there was no direct proof, since the negotiations and the subsequent

deliveries of heroin to Clark occurred with Boykin and Ivery alone. In the context of the case, however, the inference that their relationship involved the distribution of heroin was overwhelming, and sufficed to support the verdict. *United States v. Manfredi, supra*; *United States v. Calabro, supra*; see also *United States v. MacDougal-Pena*, 545 F.2d 833, 835 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 1130 (1977).

POINT III

Evidence Of a Prior Arrest For Heroin Possession Was Properly Received In Evidence Against Codell Griffin.

Codell Griffin contends that the District Court committed reversible error in allowing the Government to offer into evidence his prior conviction in 1971 for heroin possession. This contention misrepresents the record and is utterly without merit.

In a conference with the Court and counsel before the evidence was introduced, the prosecutor emphasized that while he would offer the fact of Codell Griffin's possession of heroin into evidence, he would not elicit the disposition of the case. (Tr. 1441). During direct examination of the arresting officer, Robert Boutineau, the Government was careful not to elicit the fact that Griffin had pleaded guilty to the 1971 offense. However, on cross-examination, Griffin's counsel, Mr. Schmukler, asked Boutineau specifically, "Did you tell him [Griffin] to plead guilty?" (Tr. 1533). The prosecutor immediately requested a side bar conference and was granted an opportunity to examine the witness on Griffin's guilty plea. (Tr. 1534-35). Again, however, defense counsel asked Boutineau, on recross, "By the way, what was the sentence?" (Tr. 1538). Upon examination of the State court records of

Griffin's conviction, Boutineau testified that Griffin received a probationary sentence.

Griffin's claim that the Government improperly questioned the witness about his prior conviction is thus flatly contradicted by the record, since the evidence was elicited on cross-examination. The Court allowed the Government to complete a partial and distorted picture of the guilty plea elicited by defense counsel, after the prosecutor had properly and carefully refrained from adverting to the matter. See *United States v. Panebianco*, 543 F.2d 447, 454-55 (2d Cir. 1976), *cert denied*, 97 S. Ct. 1129 45 U.S.L.W. 3571 (Feb. 22, 1977); *United States v. Rivera*, 513 F.2d 519, 528 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975).*

Griffin also contends it was error to permit the Government to go into the circumstances of the prior crime.** This claim is likewise invalid. This Court has adopted

* Griffin's reliance on *United States v. Smith*, 353 F.2d 166 (4th Cir. 1965), and *United States v. Tomaiolo*, 249 F.2d 683 (2d Cir. 1957), to support his claim that introduction of the prior conviction testimony was error, is misplaced. A cursory review of the decisions in those cases reveal that the introduction of evidence of prior convictions was based only upon the defendant having testified and placed his credibility in issue—clearly a proper impeachment purpose, F.R. Evid. 609, but wholly irrelevant here.

** While the Government may prove a prior similar act by introducing a conviction for having committed that act, see F.R. Evid. 803(22); *United States v. Vario*, 484 F.2d 1052, 1054-55 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); *United States v. Rosenwasser*, 550 F.2d 806, 811 n.5 (2d Cir. 1977) (Gurfein, J., dissenting), nothing requires the Government to do so. Indeed, since it is the similarity of the conduct, not the similarity of the crime, that is probative, *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir. 1976), there are many instances where inquiry into the details of the acts committed is especially proper.

an inclusory rule that evidence of other crimes is admissible in the Government's case in chief, unless it is offered solely to show defendant's criminal character, and provided its probative value outweighs the prejudicial effect. *United States v. Chestnut*, 533 F.2d 40 (2d Cir.) cert. denied, 429 U.S. 829 (1976); *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976); *United States v. Torres*, 519 F.2d 723 (2d Cir.), cert. denied, 423 U.S. 1019 (1975); *United States v. Papadakis*, 510 F.2d 287 (2d Cir.), cert. denied, 421 U.S. 950 (1975); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967); *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966). The weighing of probative value against possible prejudice is addressed to the sound and broad discretion of the trial court, whose determination is entitled to great weight. *United States v. Rosenwasser*, 550 F.2d 806, 809 (2d Cir. 1977); *United States v. Santiago*, 528 F.2d 1130, 1134-5 (2d Cir.), cert. denied, 425 U.S. 972 (1976); *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976). Judge Knapp properly exercised that discretion here.*

The Government's theory at trial was that in 1967 Codell Griffin began the conspiracy for which he was indicted in 1976. William Clark testified that in 1967 he began working for Codell Griffin selling heroin and continued to do so until 1969. He further testified that at that time there were other persons who also worked for Griffin. (Tr. 708-11).** To explain to the jury that

* In this regard, it should be noted that Judge Knapp did not summarily admit similar act proof. When the Government sought to introduce such evidence against co-defendant Burnside, the court, after a lengthy colloquy with counsel, excluded such testimony. (Tr. 1423-39).

** The evidence, although it concerned acts prior to the dates specified in the Indictment, was properly admitted. See Point IV, *infra*.

Griffin continued to sell heroin after 1969, the Government properly showed other facets of the conspiracy, which included evidence of heroin selling in 1971. See *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 1101, 45 U.S.L.W. 3570 (Feb. 22, 1977); *United States v. Natale*, *supra*; *United States v. Torres*, *supra*. Therefore, the underlying facts of Griffin's heroin possession in 1971 were essential to establish that Griffin continued to engage in a pattern of conduct encompassed by the conspiracy. *United States v. Papadakis*, *supra*, 510 F.2d at 294-95; *United States v. Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971).

In *Papadakis* this Court held:

The charge of conspiracy to commit criminal acts always requires proof of a course of conduct that will circumstantially prove the corrupt agreement. There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes.

510 F.2d at 294-95. That is precisely what the Government's proof accomplished in this case.

Griffin relies on *United States v. Adderly*, 529 F.2d 1178 (5th Cir. 1976), as authority for the proposition that unless a defendant's intent is raised, evidence of similar acts would be inadmissible. (Codell Griffin Br. at 25-8). However, his reliance is again misplaced. In *Adderly*, the Court, in affirming the conviction, stated at 1180, "we agree that the offense of conspiracy by its very nature requires an element of intent or knowledge sufficient to allow an exception to the general rule of exclusion of prior misconduct." Here, admission of the

similar act testimony not only showed the existence of a pattern of conduct by Griffin, but also confirmed his continuous heroin dealings during the course of the conspiracy. See *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976); *United States v. Miranda*, 526 F.2d 1319 (2d Cir. 1975), *cert. denied*, 429 U.S. 821 (1976); *United States v. Brettholz*, 485 F.2d 483 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974).

Finally, even were it assumed that admitting the testimony was error, its admission was harmless. Not only was the evidence of minimal impact, but the rest of the evidence against Codell Griffin was overwhelming. *Harrington v. California*, 395 U.S. 250, 254 (1969); *United States v. Araujo*, 539 F.2d 287, 290 (2d Cir. 1976); *United States v. Williams*, 523 F.2d 407, 409-10 (2d Cir. 1975).

POINT IV

The Trial Court Did Not Abuse Its Discretion In Admitting Evidence Of Acts Antedating The Dates Alleged In The Indictment.

Codell Griffin complains that Judge Knapp abused his discretion in refusing to exclude evidence of acts committed by Griffin prior to the September 1971 date alleged in the indictment as the commencement of the conspiracy. His argument misunderstands the law and the facts, and is meritless.

The witness William Clark testified that in 1967 he began to sell heroin under the supervision of Codell Griffin. These activities, which continued until Clark's arrest in 1969, were virtually identical, in terms of Griffin's organization, *modus operandi* and geographic location, to the activities of Griffin occurring after September 1971.

Later, in 1975 and 1976—and several years after Clark had become an informant for the DEA—Clark approached Griffin and engaged in several conversations with him about heroin that were of considerable significance in demonstrating Griffin's activities at that time. (Tr. 733-735, 744). Clark's testimony of his earlier transactions was admissible for at least two reasons.

First, this Court has noted on innumerable occasions that evidence outside the precise dates alleged in the conspiracy count is admissible to show the "background," *United States v. Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), or the "development," *United States v. Torres, supra*, 519 F.2d at 727, of the conspiracy, or the "pattern of conduct," *United States v. Papadakis, supra*, 510 F.2d at 295 or a conspirator,* see generally, *United States v. Stassi*, 544 F.2d 579, 583 (2d Cir. 1976); *United States v.*

* The mere fact that there may have been gaps in the Government's proof of Griffin's activities in 1967 through 1969 and his later acts certainly does not deprive this evidence of its probative value, since the jury was clearly able to infer that the acts all involved the same conspiracy or, at the least, that the earlier acts represented the "background" of the later ones. As this Court has noted, a conspiracy does not end, or even become two separate conspiracies, simply because there is a hiatus of activity or a time gap in the proof. *United States v. Stromberg*, 268 F.2d 256, 263-64 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States v. Panebianco*, 543 F.2d 447, 453 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1129 (Feb. 22, 1977). In addition, conspiratorial activity once shown to have commenced is presumed to continue, *United States v. Borelli*, 336 F.2d 376, 389 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965), and the burden is on the defendant to show cessation of activity, *United States v. Panebianco, supra*, 543 F.2d at 453. Particularly given the great similarity of the acts, organization and locale, the jury was justified in concluding that Griffin's activity continued after Clark ceased dealing with him in 1969 until the proof recommenced in 1971.

Araujo, 539 F.2d 287, 289 (2d Cir. 1976);* *United States v. Flores*, 538 F.2d 939, 943-45 (2d Cir. 1976), and cases there cited. In this case, the similarity of the conduct, in terms of pattern of activity, *modus operandi*, and geographical locale, rendered the evidence of particular probative value. As such, it was well within the discretion of the trial judge to admit it.**

Second, the evidence was admissible to explain Clark's relationship with Codell Griffin. An important element of the Government's proof was that in 1975, when Griffin's control over his organization was firmly established and, as the jury had seen, he had carefully insulated himself from direct contact with any but his closest confidants, Clark and Agent Blackburn approached Griffin and Clark almost immediately engaged in conversations with him about narcotics. This testimony would have been anomalous, if not incredible, had the jury not known that Clark and Griffin had had an earlier, similar relationship, causing Griffin to trust Clark. It was for precisely this reason that this Court upheld admissibility of evidence of a similar act in *United States v. Magnano*, *supra*, 543 F.2d at 435, where the evidence was useful "to explain how [a government witness], who had been incarcerated from 1966 to 1973, was able to become an accepted mem-

* In *United States v. Araujo*, *supra*, this Court noted that a similar act of a conspirator not even on trial and not occurring during the time alleged in the conspiracy count was nonetheless to show the conspiracy's background and existence. It must surely follow *a fortiori* from this decision that evidence involving the principal conspirator is admissible.

** As noted, p. 26, *supra*, the admissibility of similar evidence is peculiarly within the sound discretion of the trial judge to determine. *United States v. Rosenwasser*, *supra*, 550 F.2d at 809; *United States v. Leonard*, *supra*, 524 F.2d at 1092. In this case, Judge Knapp admitted the evidence only after several witnesses had been heard, he had received a memorandum of law on the issue from the Government, and counsel had been heard on the matter after having had several days to read the Government's memorandum.

ber of the conspiracy upon his release." * In short, the evidence was properly admitted.**

POINT V

The Government's Proof Established A Single Conspiracy; There Was No Prejudicial Variance.

Codell Griffin claims that the evidence at trial established the existence of more conspiracies than the one conspiracy charged in the indictment. He further argues that as a result of the multiple conspiracies shown, there thus was a variance which substantially prejudiced his rights. These allegations, which are "now routine in narcotics conspiracy cases," *United States v. Head*, 546 F.2d 6, 7 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 1129 (Feb. 22, 1977), see also *United States v. Panebianco*, *supra*, 543 F.2d at 452; *United States v. Magnano*, *supra*, 543 F.2d at 433, are factually and legally unsupported.

* Indeed, the facts in *Magnano* were substantially more troubling than those here, since the prior acts were far less "similar" and far older. While this Court's opinion notes that the acts occurred "several years" prior to the conspiracy alleged in the indictment, the record reveals that the gap was more than ten years, a fact vociferously argued by the appellants in that case.

** Griffin notes that no limiting instruction was given to the jury on the use to which the evidence was to be put. He neglects to inform the Court, however, that he not only never requested any such charge in his requests to charge, but did not object to the charge as given. He is thus precluded from raising the issue on appeal. *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975); *United States v. Nathan*, 536 F.2d 988, 992 (2d Cir.), *cert. denied*, 429 U.S. 930 (1976); *United States v. Ingenito*, 531 F.2d 1174, 1176 (2d Cir. 1976). Nor could this failure even remotely be considered plain error. See *United States v. Araujo*, *supra*, 539 F.2d at 290-91 (erroneous charge on use of similar act evidence a harmless error).

A. The evidence demonstrated a single conspiracy

Griffin's argument not only distorts the evidence presented to the jury, which quite clearly showed the organization and existence of a single conspiracy in which appellants formed the nucleus, but ignores the controlling law in this Circuit.

The Government recognizes this Court's recent expression of concern that "[w]hen a pattern of illegal activity persists over an extended period of time, with participants moving on and off the scene of action, it is sometimes difficult to establish that they are all part of a single conspiracy." *United States v. Taylor*, Dkt. No. 76-1210, slip op. 2805, 2809 (2d Cir. April 13, 1977), quoting with approval, *United States v. Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976). However, this Court has also noted that the single-multiple conspiracy issue is primarily for the jury to decide. *United States v. Taylor*, *supra*; *United States v. Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960, 45 U.S.L.W. 3624 (May 3, 1976); *United States v. Torres*, *supra*; *United States v. Calabro*, *supra*, 449 F.2d at 893; *United States v. Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). Thus, the issue on appeal is whether the legal standard given to the jury by the trial court in its charge was correct and whether, viewing the proof in the light most favorable to the Government, there was sufficient evidence to permit the jury to find the single conspiracy alleged. *United States v. Taylor*, *supra*; *United States v. Ricco*, 549 F.2d 264, 268 (2d Cir. 1977). The Government demonstrated all the relevant criteria articulated in prior decisions of this Court tending to show the existence of a single conspiracy.

When viewed in the context of the facts of this case, Codell Griffin's claims are particularly devoid of merit. As a whole, the Government's proof demonstrated a "vertically integrated loose knit combination" peculiar to New York City narcotics ventures. *United States v. Bynum*, 485 F.2d 490, 495 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). With particular reference to Griffin, however, the proof demonstrated that he was personally in charge of the narcotics operations alleged in the indictment and proved at trial; in other words, his specific connection with each of the various narcotics relationships underlying the indictment was demonstrated. Indeed, none of the defendants at trial had a position superior to or independent of Griffin.

Furthermore, the proof showed a consistency of locale and "type of operation" that is the hallmark of a single conspiracy. *United States v. Hinton*, 543 F.2d 1003, 1014 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 796 (1977). During the period charged in the indictment, Griffin engaged in and oversaw a series of transactions in the same area of Harlem, in which the same drug (heroin) was distributed in virtually an identical manner. Furthermore, of course, the purpose of this activity was at all times the distribution solely for profit, of massive sales of heroin at the street level. *United States v. Sperling*, 506 F.2d 1323, 1340 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Nor is it dispositive, as Griffin claims, that the personnel he recruited to run his operation changed over the course of the conspiracy for, as this Court has noted, a conspiracy is not "terminated simply by a turnover in some of the personnel." *United States v. Panebianco*, *supra*, 543 F.2d at 453; *United States v. Calabro*, *supra*, 467 F.2d at 982-83. With particular reference to the relationship of Codell Griffin with Boykin and Ivery, those transactions were remarkably consistent with Griffin's demonstrated use of unknown third parties to effectuate critical portions of nar-

cotics sales and his failure personally to make actual distributions to customers, thus insulating himself from detection. The facts of his reprimanding Boykin for talking with others during the sale (Tr. 738-39) and being consulted by Ivery immediately after Ivery's negotiations (Tr. 746) further demonstrated their relationship to Griffin and the conspiracy. In short, this evidence, and the inferences flowing therefrom, supported the jury's finding of a single conspiracy. *United States v. Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Leong*, 536 F.2d 993, 996 (2d Cir. 1976); *United States v. Bynum*, *supra*, 485 F.2d at 496. See *United States v. Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975); *United States v. Mallah*, 503 F.2d 971, 983-84 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States v. Tramunti*, *supra*, 513 F.2d at 1106. It follows then that the jury was amply justified in its finding that a single conspiracy existed.*

* Griffin's reliance on this Court's opinion in *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), is misplaced. There the Court found that the narcotics transactions "could hardly be attributed to any real organization, even 'a looseknit one,'" that there was no evidence which revealed "what could seriously be called 'a regular business on a steady basis,'" and that only one of the several distinct operations "resembled the orthodox business operation we have found in narcotics conspiracies." *Id.* at 155.

Here, the proof established that clearly Griffin, as the nucleus, was aware of the larger scope of his narcotics activities as he was the conspiracy, and he operated and controlled his organization only for profit. Further, unlike *Bertolotti*, he purchased and sold substantial amounts of heroin on a continuous basis. To suggest that his activities did not amount to a "regular business" ignores the record of his actions from 1967 through 1976. Evidence of Griffin's method of operation, and his continuity in the narcotics trade negates a conclusion here that the transactions involving Boykin and Ivery constituted two discrete conspiracies apart from that charged in the indictment.

B. There was no prejudicial variance

Similarly without merit is Griffin's contention that reversal is required because of a prejudicial spillover which resulted from the introduction of evidence of conspiracies in which he was not involved and consideration of that evidence by the jury in their deliberation concerning the conspiracy in which he was a participant (Codell Griffin Brief Point VI). In the first place, the argument is patently frivolous in that, as noted, there was only one co-conspirator charged and found. Moreover, even if more conspiracies were shown, the activities of those not named do not appear to have been conspiring with, Boykin's and Ivery's sales of heroin to Clark, were hardly more flagrant than his in negotiating and selling heroin to James Bryant earlier in 1976.* In any event, any variance that may have been found between the proof and the indictment resulted in no demonstrable prejudice. Further, the jury's finding Boykin not guilty and inability to reach a verdict as to Ivery on the conspiracy count demonstrates the jury's ability to carefully and adequately sift the evidence. *United States v. Rosenwasser*, *supra*, 550 F.2d at 809, n.7; *United States v. Corr*, 543 F.2d 1042, 1053 (2d Cir. 1976); *United States v. Variano*, 550 F.2d 1330, 1334 (2d Cir. 1977). It is thus clear the jury convicted Griffin and others only on those counts where they were satisfied of the evidence against them beyond a reasonable doubt. See *United States v. Tramunti*, *supra*, 513 F.2d at 1108; *United States v. Ricco*, *supra*, 549 F.2d at 268-71; *United States v. Sir Kue Chin*, 534 F.2d 1032, 1035 (2d Cir. 1976).**

* In addition, of course, the evidence was more than sufficient to allow the jury to conclude that Boykin and Ivery were working for Griffin.

** Griffin's claim that hearsay statements were improperly admitted under the co-conspirator exception since "declarations by co-conspirators are admissible under the conspiracy exception

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POINT VI

The Court Properly Denied Codell Griffin's Motion For Acquittal On Count II And, Therefore, Evidence Concerning That Charge Was Properly Submitted To The Jury.

Codell Griffin contends that the Government failed to sustain its burden of proving a violation of Title 21, United States Code, Section 848(b)(2)(A). Specifically, he says that there was not a sufficient showing that he maintained the necessary managerial or supervisory position in drug trafficking over five or more persons.

The evidence presented by the Government established that Griffin had as employees in his heroin distribution organization Willie J. Griffin, Jerome Hatton, Leroy Sullivan, Kenneth Ivery and Thomas Boykin, all of whom assisted him in marketing, distributing and collecting proceeds from the street-level heroin sales. Moreover, Robert Burnside and John Bryant were proven to be employees of the defendant at various times. Since, as conceded by Griffin, it is not necessary under § 848 "to show that five or more people were working in his narcotics business at the same moment," *United States v. Sperling*, *supra*, 506 F.2d at 1344, the Government's burden has been sustained. See also *United States v. Jeffers*, 532 F.2d 1101, 1115 n.17 (7th Cir. 1976), *aff'd*,

to the Hearsay Rule only if they are made in furtherance of the conspiracy charged in the indictment," Brief at 43 (emphasis added), has been emphatically rejected by this Court. Rather, the admissibility of such statements rests upon "basic principles of agency and not on the presence of a conspiracy count," *United States v. Alsondo*, 486 F.2d 1339, 1346 (2d Cir. 1973) (on petition for rehearing), *rev'd on other grounds*, 420 U.S. 671 (1975). See also *United States v. Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943), *cert. denied*, 321 U.S. 744 (1944); *United States v. Marchisio*, 344 F.2d 653 (2d Cir. 1965).

— U.S. —, 45 U.S.L.W. 4691 (June 16, 1977) (statute is not in conjunctive and requires proof only of "organizer, supervisor or any other position of management.")

As a second and equally specious prong to this argument, Griffin suggests that because of the failure of the Court to have dismissed Count Two the door was left open for the introduction of prejudicial evidence that was irrelevant to the remaining charges. He claims further that he was coerced into entering into a stipulation concerning the financial status of his wife, which evidence was immaterial and irrelevant with regard to the charges against him since she was not a co-defendant in his trial.

The statute required a showing that Codell Griffin obtained "*substantial* income or resources" from his continuing series of violations of drug laws. 21 U.S.C. § 848(b)(2)(B) (emphasis added). Thus, it was incumbent upon the Government to offer evidence relating to Griffin's *substantial* income from his continuing criminal enterprise. See *United States v. Jeffers*, *supra*, 532 F.2d at 1110-11. Consequently, the Government properly introduced evidence showing extravagant expenditures by the wife of Griffin (as outlined in Codell Griffin's Brief, p. 65). When viewed in context of the fact that his wife was receiving welfare payments (thus negating any theory that she received the money from a source other than Griffin), this evidence was fully probative and relevant on the issue of Griffin's income. The Court overruled his objection to its admissibility and Griffin elected to stipulate to those facts, presumably to lessen their impact upon the jury. Thus, that ruling of admissibility by the Court was a proper exercise of its discretion and Griffin was not "coerced" into entering into its stipulation.

POINT VII

Codell Griffin Cannot Complain Of The Court's Charge.

At the conclusion of the trial, the Court charged the jury on the law to be applied, including an instruction regarding a single conspiracy. Codell Griffin made no objection at trial to that aspect of the charge. He now alleges as error the Court's failure to distinguish "between a single conspiracy and separate conspiracies with similar objectives" (Codell Griffin's Br. 50). This claim must fail as being untimely.

It is axiomatic that claims of error cannot be raised for the first time in an appellate court, and must be raised and, if necessary, explored in the trial court. *United States v. Braunig*, Dkt. No. 76-1448, slip op. 2773, 2779 (2d Cir. April 11, 1977), *cert. denied*, 45 U.S.L.W. 3790 (June 6, 1977); *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Indiviglio*, *supra*. Any other rule would necessarily result in "piecemeal" litigation and delay that is particularly detrimental to the criminal process. *United States v. Alessi*, 544 F.2d 1139, 1143 (2d Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3364 (Nov. 16, 1976). Clearly, Griffin had the burden of insuring that the trial court was aware of his position and of making, if necessary, proper and timely requests for relief. Moreover, had he brought his objection to the attention of the court, a curative instruction to the jury might have mitigated an otherwise prejudicial variance in the proof and render it harmless. See *United States v. Varelli*, 407 F.2d 735, 746 (7th Cir. 1969). Indeed, with respect to the trial court's instructions on the single-multiple conspiracy issue, this Court has noted that a defendant

who has failed to object to the charge given is "ill-equipped" to complain of it on appeal, *United States v. Head, supra*, 546 F.2d at 7, and that even if a requested charge was submitted, the request must be "accurate in every respect" if the instruction actually given is to be attacked on appeal. *United States v. Lam Lek Chong*, 544 F.2d 58, 68 (2d Cir. 1976). Griffin clearly fails to meet these tests.

Furthermore, taken as a whole, Judge Knapp's charge more than sufficed to insure that the jury made the proper factual determinations.* In particular, Judge

* The charge was as follows:

You will recollect that it is the government's contention that Codell Griffin was the organizer and principal figure in the conspiracy charged. Your first task, then, is to determine whether Codell Griffin was engaged with one or more persons (whether or not on trial before you) in a common undertaking to possess and distribute heroin.

Now, in order to conclude that the defendant Codell Griffin was engaged in such a conspiracy, you must be satisfied beyond a reasonable doubt that he knowingly and wilfully associated himself with others for the express purpose of distributing heroin within the United States, knowing such conduct to be in violation of the laws of the United States.

If you conclude such knowing and wilful conspiratorial conduct to have been established on the part of Codell Griffin, you will next consider whether Codell was engaged in one single enterprise during the entire period covered by the evidence which has been laid before you. The reason you must consider this is that such is the charge of the indictment, and under our law where a single conspiracy is charged, a person cannot be convicted upon proof of a series of separate conspiracies.

It is the government's theory that the conspiracy it claims to have established was a continuing one because Codell was at all times its guiding hand regardless of whether his associates or employees may have changed from time to time, and that the objective of the enterprise

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has always been the distribution of heroin in the general manner described. That is the government's contention, Codell was the continuing factor throughout the conspiracy, the objective was the same and the government claims it doesn't make any difference whether the persons changed from time to time, his associates.

Now, this position that I have just outlined, if established to your satisfaction, you will be justified in finding one single conspiracy. However, before you may convict Codell Griffin, you must be satisfied that the government has established this contention beyond a reasonable doubt.

To summarize then, with respect to the defendant Codell Griffin, if you find that he wilfully and knowingly engaged in the conspiracy alleged in the indictment, and that one of the overt acts named in the indictment was performed in furtherance of that conspiracy, you may convict him of the crime of conspiracy charged in the first count of the indictment.

Now, under the government's theory, none of the defendants could be guilty of conspiracy unless Codell Griffin is so guilty. So, if you find him not guilty, that ends your labors so far as concerns the conspiracy count.

If, however, you find Codell Griffin guilty, you should then consider the guilt or innocence of each of the other defendants, taking each separately, of the crime of conspiracy.

Indeed, each conspirator doesn't necessarily have to know who the others are or what they are doing or have done. What is necessary, however, is that a conspirator know that the common undertaking exists, be aware of its unlawful purpose, and intend to further that unlawful purpose.

So, the question before you at this stage of your deliberations would be to determine which, if any, of the other defendants joined Codell in his unlawful conspiracy. What must be established before any defendant can be found to have joined in such conspiracy is the following:

1. That he or she knew the existence of Codell Griffin's illegal enterprise.
2. That he or she was aware of its unlawful purpose, that is to say, the illegal distribution of heroin in the manner that has been described to you; and,
3. That he or she wilfully and knowingly undertook to further that particular unlawful purpose (Tr. 2432-35).

Knapp specifically noted that the jury must acquit unless it found the existence of the single conspiracy charged in the indictment and the defendants' membership in the conspiracy. Thus, the charge fully complied with the requirements of this Court for instructions on the multiple conspiracy question, *United States v. Taylor*, *supra*, slip op. at 2809-10; *United States v. Lam Lek Chong*, *supra*, 544 F.2d at 68; *United States v. Arnedo-Sarmiento*, *supra*, 545 F.2d at 790; *United States v. Tramunti*, *supra*, 513 F.2d at 1107-08, and was not error at all, let alone plain error as Griffin asserts.*

POINT VIII

The Sentencing Procedures Were Proper In Their Entirety.

Codell Griffin argues that he was prejudiced by not being allowed to respond at the time of sentencing to a copy of a memorandum which was before the court and had initially been submitted to another District Judge in regard to an unrelated case. He also alleges error in the courts' consideration of deterrence in the general public as a factor in determining his sentence. These arguments are utterly devoid of merit.

This circuit has followed the well-established rule stated in *United States v. Tucker*, 404 U.S. 443, 447 (1972), that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review." *United States v. Wiley*, *supra*, 519 F.2d at 1351; *United States v. Tramunti*, *supra*, 513 F.2d

* Griffin's complaints concerning the lack of a specific charge on the import of the June 29, 1976 and July 14, 1976, transactions and his 1967-69 activities are frivolous in view of the relevance of that testimony, discussed *supra* pp. 26-8, 33-4. In addition, he made no objections concerning this aspect of the charge.

at 1172; *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); *United States v. Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972); *McGee v. United States*, 462 F.2d 243, 245 (2d Cir. 1972); see also *Dorszynski v. United States*, 418 U.S. 424, 441 (1974). Only upon showing that the judge relied on constitutionally impermissible factors or material factual inaccuracies will an imposed sentence be reviewed. *United States v. Brown*, *supra*, 479 F.2d at 1172; *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970); *United States v. Mitchell*, 392 F.2d 214 (2d Cir. 1968). Griffin has simply not met his burden of showing that there were material inaccuracies upon which the judge relied in imposing sentence. *United States v. Rollerson*, 491 F.2d 1209, 1213 (5th Cir. 1974).

Griffin relies on several cases for the proposition that it is reversible error for the sentencing judge to deny a defendant access to or an opportunity to rebut, information upon which the judge bases the penalty he imposes upon the defendant. His reliance is misplaced, however, in that the cited cases concerned reports relating specifically to the defendant in each case, and these reports were considered to be prejudicial.*

In contrast, in the instant case the data in question was in the form of a survey of sentences imposed upon other persons convicted and sentenced in other narcotics cases. Moreover, although the appellant was provided

* In both *United States v. Rosner*, 485 F.2d 1213, 1231 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974) and *United States v. Robin*, 545 F.2d 775, 781-82 (2d Cir. 1976), *rehearing denied*, 553 F.2d 8 (2d Cir. 1977) (en banc), this Court found that the defendant had not had sufficient time to respond to explicit factual allegations against him, outside the scope of the indictment, made by the Government. In this case, the Government made no such factual allegations but merely, at the request of the Court, supplied information concerning sentences conferred upon similarly situated defendants in other cases.

only several minutes to review this information, the sentencing judge noted that that was the same amount of time that he had devoted to its review and consideration. To allege error on these facts is frivolous. See *United States v. Alexander*, 498 F.2d 934, 935 (2d Cir. 1974) (even where trial judge denied disclosure to defendant of presentence after judge had examined it, Fifth and Sixth Amendment claims were rejected as "wholly without merit").

Griffin's second basis of attacking the sentencing procedures must similarly fail. It has been universally held that trial judges have wide discretion in determining an appropriate sentence. The scope of such judicial inquiry is regarded as being virtually unlimited as to both the quality of information and its source. *United States v. Tucker*, *supra*. Thus, the trial courts' consideration of deterrence as an effective basis was clearly proper. See generally *United States v. Mejias*, 552 F.2d 435, 446-47 (2d Cir. 1977); *United States v. Seijo*, 537 F.2d 694, 699 (2d Cir. 1976), *cert. denied*, — U.S. — (1977).

Although a judge is generally under no obligation at the time of sentencing to state his reasons for imposing a sentence, *McGee v. United States*, *supra*, 462 F.2d at 247; but see *United States v. Hendrix*, 505 F.2d 1233, 1234-37 (2d Cir. 1974), Judge Knapp's explicit statements concerning the grounds for imposition of sentence clearly shows a proper basis for the sentence.*

* THE COURT: Mr. Griffin, will you stand.

I now have to sentence you. I am going to tell you why first.

I am faced with this situation where the jury has found you guilty of this conspiracy. It seemed to me the evidence warranted that finding. Had I been the trier of fact I would have come to the same conclusion.

As I told you or as I told the jury repeatedly, at that stage of the proceedings, it was none of my business, and as effectively as I could, I kept myself out of their deliberations. Now it does become my business and I must tell you that I thought their

[Footnote continued on following page]

verdict was justified and that I would have come to the same conclusion had it been my responsibility.

Faced with that situation, I find you convicted of two things, which seem to me extremely serious. In the first place, you were running a retail establishment in the center of Harlem. I don't need to tell you, you have lived there, I don't need to tell you the effects of heroin on the people that use it. You are more intimately aware of that than I am. I get it occasionally on defendants that come before me who have committed other crimes because of this dependence on heroin. I see it indirectly. You see it every day of your life, I am sure.

You are no Stassi, that's for sure, but without people like you the Stassi wouldn't have anything to do. The point is that you are there in Harlem, you see the effect of what is going on, and you are running an enterprise to distribute.

The other thing is you go back to North Carolina—is it South Carolina?

MR. SCHMUKLER: South Carolina.

THE COURT: You go back to South Carolina and you get people like Ken Ivery, your friends, people who have learned to look up to you, because apparently you did have a fine position down there, and you bring them up here and introduce them into this kind of operation.

I am telling you what I have to act on, what I believe. You may think I am wrong. I told the jury in charging them the buck stops with them. It's now come to me and the buck stops here and I have got to decide what I believe to be the facts. I believe to be the facts what I am telling you.

I am well aware of what Mr. Schmukler said about the effects of prison on a human being and I must say that you have in you certain qualities. You impressed me. You seem to be a man of some potentials. And I agree with Mr. Schmukler that if you hadn't come here you would have been all right. But you did.

I am faced with what my sentence says to the community about the conduct which you have been engaged in and that, it seems to me, has to be paramount in this situation. In the light of that I can't see giving you less than I am going to give you.

It's the judgment of the court that on each of the counts of which you have been convicted you serve a term of 15 years, the terms to run concurrently, special parole of an additional five years.

As Mr. Schmukler pointed out, if you don't measure up when you come out that could mean 20 years' sentence. That's the judgment of the court.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
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RONALD L. GARNETT,
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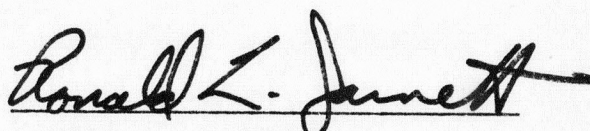
RONALD L. GARNETT being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the 5th day of July, 1977
he served 2 copies of the within brief for the United States
by placing the same in a properly postpaid franked
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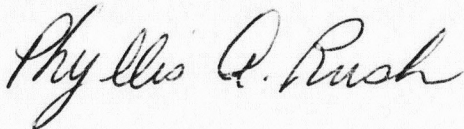
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RONALD L. GARNETT
Assistant United States Attorney

Sworn to before me this

5th day of July, 1977



PHYLLIS A. RUSH
Notary Public, State of New York
No. 03-4635198
Qualified in Bronx County
Commission Expires March 30, 1978